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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1957

No. 171

HUGH BRYSON,
Petitioner,
vs.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit.

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Hugh Bryson respectfully petitions for a rehearing of the Order of October 14, 1957, denying his petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit to review its judgment in this case.

STATEMENT.

On June 6, 1957, there was filed in this Court a petition for a writ of certiorari to the Court of Appeals for the Ninth Circuit. The questions presented by said petition

were in substance and effect (1) whether section 9(h) of the Taft-Hartley law (29 U.S.C.A. 159[h]) was unconstitutionally applied to petitioner; (2) whether the term "affiliated" as used therein was applied to petitioner in a manner contrary to this Court's decision in *American Communications Association v. Douds*, 339 U.S. 382; (3) whether, in the light of this Court's decision in *Bridges v. Wixon*, 326 U.S. 135, the jury was correctly instructed on the meaning of the term "affiliation"; (4) whether petitioner's conviction was supported by substantial evidence; and (5) whether errors were made in other respects which prevented petitioner from having a fair trial.

On October 14, 1957, this Court denied the petition.

JURISDICTION OF THIS COURT.

This petition for rehearing is filed pursuant to Rule 58(2) of the Rules of the Supreme Court of the United States.

The grounds upon which it is based are that there are substantial grounds available to petitioner for granting the petition which were not previously presented, and that there exist intervening circumstances of a substantial or controlling effect.

REASONS FOR GRANTING THE REHEARING AND THE PETITION.

1. PETITIONER IS INNOCENT OF THE ALLEGED CRIME OF WHICH HE WAS CONVICTED.

Petitioner was convicted of having falsely stated in April of 1951 that he was not then "affiliated" with the Communist Party. The conviction, which the Court of Appeals affirmed, was based upon evidence that petitioner had been a "member" of the Communist Party from 1937 to 1947, that the party had adopted a policy of having its members "resign . . . in name only" if necessary to execute the affidavits, and that petitioner had made extra-judicial admissions in July of 1954 that he was still a Communist.

While this might conceivably have made out a case that petitioner was a "member" in 1951, the jury rejected this evidence and returned a not guilty verdict on the membership count. Whether this acquittal must now be taken as a jury finding that the evidence proffered by the Government was not worthy of belief is irrelevant here, for in any case the evidence relating to membership—and there was no other evidence—cannot make out the case on affiliation. Thus the conviction upon the affiliation count is devoid of evidentiary support in the record and petitioner is patently innocent of the count on which the conviction was returned. Why a jury would have returned what was plainly a compromise verdict in a case involving "communism" may be a matter of some speculation; but the hard fact is that on this record there was no proof of the charge made in the second count.

The record shows that the Government tried its case solely upon the theory of membership, and that it offered

no evidence directed to the affiliation count as such. This much is true whether affiliation be now defined, as this Court had defined it in *Bridges v. Wixon*, 326 U.S. 135, or as the trial judge quite differently defined it in his charge. This situation is analogous to the one presented to this Court in *Cole v. Arkansas*, 333 U.S. 196. In reversing a conviction obtained under one section of a statute although the evidence showed a violation of a different section, this Court said:

> "It is as much a violation of due process to send an accused to prison following conviction on a charge *on which he was never tried* as it would be to convict him on a charge that was never made" (333 U.S. at 201).

The record shows that petitioner was "never tried" upon the affiliation count. The Government's case throughout was based on the membership count as its own statement of facts in its opposition to the petition makes this clear.[1]

Having obtained a conviction on the affiliation count, the Government naturally seeks to sustain it. But the record is that the case in the District Court consisted of

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[1]This was quite explicitly recognized in the court below in its consideration of the sufficiency of the evidence to sustain the conviction on the *affiliation* count:

> "Can a person who is proved to have been a member of the Communist Party successfully claim that he was not affiliated with it? To the layman this suggestion would be absurd. The law does not require a different result. The *Wixon* case stated that the term 'affiliation' imports less than membership but more than sympathy. Accordingly, proof of membership would establish affiliation *a fortiori*". (238 F.2d 657, at 663).

The difficulty with this reasoning for this case is that petitioner was not "proved to have been a member" at any time near the critical period; to the contrary, he was acquitted of that charge.

evidence relevant only to membership and not to affiliation. Having tried petitioner to all intents and purposes on the first count of the indictment, the Government should not now, after a jury acquittal on that count, be permitted to imprison him on the erroneous claim that it proved a violation of the second count. Proof of the charge on which he was acquitted should not be permitted to sustain the charge on which no proof was offered. Such a situation presents not only a patent denial of due process, but actually demonstrates the innocence of petitioner of the charge of which he was convicted.

It is not to be denied that the guarantee of due process in criminal cases embraces *procedural* fairness, as this Court's recent decisions so properly remind us. But this is not to suggest that *substantive* fairness is outside the scope of constitutional protection. If, on the record made, the defendant is not shown to be guilty according to prevailing standards of proof, he should be ordered acquitted, however attentive the trial court may have been to enforce procedural safeguards. For it is the purpose of criminal proceedings—and their *only* purpose—to convict the guilty, not the innocent. This Court itself has demonstrated that its concern is not merely with insuring the appearance of justice, but also to free those not shown guilty, however "fair" the trial has been. Cf. *Yates v. United States*, 354 U.S. 298.

The petition for the writ included, among the questions presented, that of whether the conviction was supported by proper and competent evidence. But the innocence of petitioner in the terms now urged was not

argued because the heavy reliance of the Government upon pre-affidavit evidence, its failure to prove that the "affiliation" was for an unlawful purpose, and the failure of the trial judge to instruct as required by *Bridges v. Wixon, supra*, appeared to be questions so clearly embraced within the scope of the writs theretofore granted in *Gold v. United States*, 352 U.S. 985, and *Jencks v. United States*, 353 U.S. 657, and left unresolved by those cases, as to lead to the pardonably confident belief that certiorari would be granted here. Petitioner's counsel could not believe that in his case this Court would refuse to review questions covered by the writs already issued in *Gold* and *Jencks:* questions, moreover, which the Government itself had urged this Court to decide, questions upon which the Court was "sorely divided", and questions, the resolution of which was said to be required in the interests of sound judicial administration.

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2. SINCE THE SUBMISSION OF THE PETITION FOR THE WRIT HERE, TWO OTHER TAFT-HARTLEY OATH CASES HAVE REACHED DECISION IN THE COURTS OF APPEAL.

In *United States v. Killian*, 246 F.2d 77 (7 Cir.), a conviction for the filing of a false affidavit was reversed on rehearing upon the authority of *Jencks v. United States*, 353 U.S. 657. However, prior to the decision in *Jencks*, the Court of Appeals had affirmed the conviction on an appeal raising questions similar to those here presented. Undoubtedly, but for the circumstance that *Killian* went off on the *Jencks* point, that case would now be pending here on certiorari presenting these very questions.

In *Travis v. United States*, 247 F.2d 130 (10 Cir.), a conviction for the filing of a false affidavit was reversed on the ground that, contrary to the opinion in *Gruenwald v. United States*, 353 U.S. 391, prejudicial error had been committed in the cross-examination of defense character witnesses. However, the opinion indicates that present also in the case were questions relating to the adequacy of instructions on membership and affiliation, and to the validity of the indictment. Again, but for the fact that the case went off upon another ground, it is clear that the *Travis* case would now be pending here on the questions left unresolved in *Gold* and *Jencks*, and presented here.

These decisions underline both the important and recurrent nature of the questions presented by the petition here, and emphasize the need for their early determination. Certainly it cannot be the law that only those accused of violating Section 1001 who are "fortunate" enough to have the trial judge deny their requests to inspect F.B.I. reports or permit inquiry into matters foreclosed by the Fifth Amendment, are entitled to have their convictions reviewed in this Court. Obviously there are other questions at least equally important; and as the *Killian* and *Travis* cases show, they are, and are bound to be, recurrent. The lower federal courts presumably have learned the lessons of *Jencks* and *Gruenwald*; but that does not mean that there are no important questions left in these Taft-Hartley oath cases.

3. SINCE THE SUBMISSION OF THE PETITION FOR THE WRIT HERE, A CASE HAS BEEN DECIDED IN THE TENTH CIRCUIT WHICH CONFLICTS WITH THE DECISION BELOW ON THE QUESTION OF RELIANCE UPON LONG PAST ACTIVITIES TO CORROBORATE EXTRA-JUDICIAL ADMISSIONS.

In *Kelly v. United States*, 246 F.2d 864 (10 Cir.), the Court of Appeals, relying upon *Opper v. United States*, 348 U.S. 84, and *Smith v. United States*, 348 U.S. 147, reversed a judgment of conviction on the ground that the extra-judicial admission was not adequately corroborated. The issue in the case was whether the defendant had transported a firearm in interstate commerce. His extra-judicial admission was that he had done so. The "independent evidence" tending to establish the trustworthiness of that admission was that the defendant, who was arrested in Colorado in 1956, had been in Missouri in 1951 and for some time thereafter. The Court of Appeals held that this evidence was not sufficient to corroborate the extra-judicial admission.

> "We do not believe that Kelly's presence in Missouri some six years before the alleged offense, nor his presence in an automobile bearing Missouri license plates, considered independently, lends any substantial support to the Government's case" (246 F.2d, at 866).

This decision squarely conflicts with the holding below, that evidence of petitioner's Communist Party membership four years before the commission of the alleged crime, was sufficient corroboration of his extra-judicial admission. Clearly there is no difference in principle between the six year gap in the *Kelly* case and the four year gap in the case at bar. If the ancient evidence was not ade-

quate corroboration in the one case, it cannot logically be in the other.

On this point alone, and even without the necessity of considering the constitutionality of the Taft-Hartley law as here applied, or the correct meaning of the term "affiliation", or any of the other questions left open in *Gold* and *Jencks*, and presented by the petition here, this petition for rehearing should be granted. The writ should be issued to resolve the conflict between the case at bar and the *Kelly* case.

CONCLUSION.

For the foregoing reasons, in addition to the reasons specified in the petition for the writ, this petition for rehearing should be granted, the writ of certiorari issued, and the judgment below reversed.

Dated, San Francisco, California,
November, 1957.

Respectfully submitted,

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